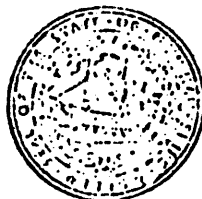


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January 9, 1974

Gerald B. Shattuck, M.D.  
Vice Chairman  
Advisory Commission on Health and Welfare  
194 Pleasant Street  
Concord, New Hampshire 03301

Dear Dr. Shattuck:

The letter of December 27, 1973 from Mr. Paul E. Emery, M.D., on your behalf, poses a number of questions with regard to the selection of a Commissioner of Health and Welfare which are considered below as they are raised. First, you have asked if the Advisory Commission is required under RSA 126-A:4 (as amended by 1973 Laws 425:2) to submit more than two nominees to the Governor and Council for appointment as Commissioner of Health and Welfare. RSA 126-A:4 (as amended by 1973 Laws 425:2) provides in part:

... a commissioner of health and welfare ...  
shall be appointed by the governor and council  
from two or more nominees or, if agreeable to  
the governor, a lesser number of candidates nomi-  
nated by the advisory commission ....

The language of this statute literally requires only two nominees, allowing more at the option of the Commission. Therefore, the answer to your question is "no".

You have further asked whether the Governor and Council have legal authority to direct the Commission to submit in nomination the name of a person specified by the Governor and Council. The answer is "no", for the following reasons. The statute, above quoted, clearly sets out a procedure whereby the Commission is to have the power to nominate, not the Governor and Council as is the case, for example, with regard to the appointment of the Commissioner of Safety under RSA 106-A:2. The New Hampshire Constitution Article Second, Part 5 states in part that:

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... full power and authority are hereby given and granted to the said general court ... to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state ....

Therefore, RSA 126-A:4 (as amended by 1973 Laws 425:2), which stands currently as a necessary part of the method fixed by the Legislature for naming and settling the position of Commissioner of Health and Welfare, is the method to be used.

You question also whether the Governor and Council are required under RSA 126-A:4 (as amended by 1973 Laws 425:2) to appoint one of the nominees submitted by the Commission. The answer is "no", for the following reasons. First, the use of the word "shall" in the statute, set out above, must be read with its modifiers, which may be read to indicate that "shall" prescribes only who has the power of appointment. Additional modifiers would be necessary to establish a mandatory duty of appointment. See, State v. Burroughs, 113 N.H. 25 (1973). Further, the statute does not set a time limit for action, nor does it provide an alternative procedure in the event no action is taken. The absence of such provisions, when the statute has been revised twice in twelve years in the direction of further specificity (Laws of 1965, Chapter 352:1, Laws of 1973, Chapter 425), gives rise to the presumption that no such affirmative duty incumbent upon the Governor and Council was intended by the Legislature. See, Opinion of the Justices, December 7, 1973.

Second, although you have asked whether the Governor and Council "are required" to appoint one of the two nominees submitted, under the given circumstances that is equivalent to having asked whether they may be compelled to do so. We are of the opinion that they may not. The basic function given the Governor and Council by the Legislature under RSA 126-A:4, above, is that of choosing which of the two or more nominees they prefer for the office, and then completing the formalities of appointment. Such a choice, however limited, essentially involves an exercise of discretion. If an official has failed to perform a duty which is not discretionary in nature, the proper procedure for compelling him to perform such a duty is a petition for a writ of mandamus. It is settled law that such a writ cannot issue to compel performance consisting essentially of discretionary choice. Petition of Farwell, 2 N.H. 123 (1819). See, Bois, et al v. Manchester, et al, 104 N.H. 5 (1962). Thus we conclude that such an appointment may not be compelled.

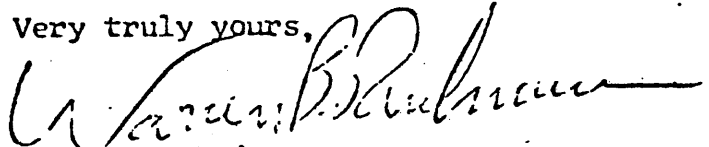
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You have asked whether the Commission, acting as Commission, may bring a declaratory judgement action or petition for writ of mandamus against the Governor and Council to determine whether the latter must appoint one of the two Commission nominees. Our position is that the Attorney General has been vested with the authority, pursuant to RSA 7, to decide questions of law and controversies between state agencies. We have done so, above, in this opinion, at your request. Therefore, it is our opinion that such action as you question about is not necessary. Further, we have examined those sections of RSA 126-A which constitute and empower the Commission, and we are able to find no affirmative basis for concluding that the Commission is given the power to seek review of the action of the Governor and Council. Therefore, we would be unable to conclude that the Commission could officially act to seek such review.

You have asked the additional question as to whether individual Commissioners, as taxpayers, may bring a declaratory judgement action or a writ of mandamus against the Governor and Council on this matter. This office, under RSA 7, is not empowered to provide legal counsel to private citizens, who must be and routinely are referred to private counsel. Therefore, we must decline to answer the question.

Your final question, by its own terms, does not require an answer since it is predicated upon an affirmative response to at least one of the two questions considered immediately above.

Very truly yours,



Warren B. Rudman  
Attorney General